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300159—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 775

CALIFORNIA LUMBERMEN'S COUNCIL, COAST COUNTIES LUMBERMEN'S CLUB, CENTRAL VALLEY LUMBERMEN'S CLUB, NORTHERN COUNTIES LUMBERMEN'S CLUB, PENINSULA LUMBERMEN'S CLUB, SAN JOAQUIN LUMBERMEN'S CLUB, AND THE OFFICERS, COUNCILMEN, AND MEMBERS OF SAID ORGANIZATIONS AND ASSOCIATIONS, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 164) is reported in 115 F. (2d) 178. Two earlier opinions by that court denying preliminary motions made by petitioners in this proceeding (R. 161, 163) are reported in 103 F. (2d) 304 and 104 F. (2d) 855.

JURISDICTION

The decree of the Circuit Court of Appeals was entered October 1, 1940 (R. 184–188) and an order denying a petition for rehearing was entered on November 19, 1940 (R. 189). Petition for writ of certiorari was filed February 19, 1941. The jurisdiction of this Court is invoked under section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719 (15 U. S. C., sec. 45), and section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a showing that the transcript of the hearing before the Commission's trial examiner does not include *everything* said during the course of the hearing is sufficient to establish denial of a fair hearing, in the absence of any showing that anything material to the issues was omitted from the transcript.

2. If so, whether petitioners' proper remedy was an application to the reviewing court for leave to adduce additional evidence, under section 5 (c) of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, sec. 45), provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or

practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and pro-

> ceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. * * *

STATEMENT

Petitioners seek certiorari to obtain review of the decree of the court below affirming an order of the Federal Trade Commission entered in a proceeding under section 5 of the Federal Trade Commission Act. The order directs California Lumbermen's Council and five affiliated organizations composed of retail dealers in lumber and building materials to cease and desist, in their

purchases and sales in interstate commerce, from combining and conspiring to engage in certain acts and practices (R. 48–51). The most important of the acts and practices covered by the order are (a) using boycott or threats of boycott to induce or compel manufacturers, producers, and wholesalers to refrain from selling lumber and building materials to nonmembers of petitioner organizations or to refrain from selling except on discriminatory terms; (b) fixing uniform prices at which members of petitioner organizations should sell lumber or building materials in particular trade areas; and (c) fixing quotas of the amounts of lumber and building materials which manufacturers, producers, and wholesalers may sell in particular trade areas.

Throughout this proceeding, both before the Commission and in the court below, petitioners' counsel has avoided any contest with respect to the merits of the issues raised by the Commission's complaint and has, instead, attempted to establish some form of procedural error.

The Commission issued a complaint against petitioners on August 14, 1936 (R. 2–22). Petitioners answered (R. 22–32), and evidence was taken before a trial examiner designated for this purpose by the Commission.

Thereafter petitioners filed with the Commission a motion (R. 32–46) alleging that the transcript of the hearing before the examiner was incomplete, and praying that the Commission order the

reporter to file a correct transcript. The Commission denied the motion, "for the reason that there is already on file a true, full and correct transcript of the record" (R. 46–47). Subsequently the Commission issued findings of fact, conclusions of law, and an order directing petitioners to cease and desist from the various unfair methods of competition found.[1]

Petitioners filed a petition for review in the court below. Thereafter petitioners filed motions to strike the transcript of the record and to require the Commission either to file a proper transcript or to vacate its order. The court denied the motions (R. 161–162). In its opinion it said that petitioners' complaint, that the examiner would not allow them to make of record various matters, could not properly be heard until the case came before the court on the merits, since its disposition would require knowledge of the pertinency of the excluded matter to the case as a whole (R. 161–162). The court also suggested that petitioners might move for leave to adduce additional evidence under section 5 (c) of the Federal Trade Commission Act.

Subsequently petitioners filed a motion to require the Commission to file a supplemental transcript of record. This motion was also denied (R. 163–164).

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[1] The Commission's findings of fact and conclusions of law are not included in the present record. They are reported in 28 F. T. C. Decs. 515.

On October 1, 1940, the court rendered an opinion upholding the order of the Commission (R. 164–183) and entered a decree accordingly (R. 184–188). It disposed of petitioners' complaints about the striking or rejection of evidence and their claims of unfair trial upon the grounds that they should have moved for leave to adduce additional evidence, as suggested in the court's earlier opinion, and that they had not attempted to show the materiality of the excluded portions of the record, or wherein they had been prejudiced (R. 175–176).

A petition for rehearing was denied November 19, 1940 (R. 189).

ARGUMENT

I

Petitioners contend that the trial examiner denied them a fair trial, and prevented the making of a full and fair record. The rulings of the examiner of which petitioners complain fall into four categories: (1) a ruling preventing petitioners from making an offer of proof as to operations under the NRA Code for the industry; (2) four rulings striking from the record testimony theretofore admitted; (3) "off the record" directions given to the stenographic reporter; and (4) refusal to permit proof or offer of proof that, by reason of rulings or directions of the nature of (1), (2), and (3) above, the transcript of the hearing was incomplete.

For the most part, the petition sets forth the bare text of the rulings, without explaining their subject matter or the circumstances under which they were made and without noting that, in some of the instances cited, later proceedings served to remove any possible prejudice to petitioners. Likewise, the portion of the transcript of the hearing which petitioners designated for printing in the court below is largely composed of fragmentary extracts which set forth only the examiner's rulings and the immediately preceding proceedings. We submit that petitioners have not shown that they were substantially prejudiced by any erroneous ruling of the examiner.

1. The petition for certiorari sets forth (p. 3) that the examiner refused to permit an offer of proof. The examiner had just sustained an objection to cross-examination of a Commission witness as to activities under the NRA Code, on the ground that such cross-examination was not responsive to the direct (R. 55–56). Petitioners' offer of proof was inadmissible for the same reason. Petitioners were not prejudiced by the ruling in any event, since they were later permitted to make an extended offer of proof concerning the NRA Code and operations thereunder (R. 75–87).

2. The petition for certiorari sets forth (p. 4) four instances in which the examiner directed that there be stricken from the record testimony there-

tofore admitted. All of the testimony thus stricken had been given by *Commission* witnesses on direct examination (R. 57, 60–61, 63). Petitioners' counsel took no exception to the examiner's rulings nor did he, so far as the present record shows, try to introduce the stricken testimony. Furthermore, the context shows that the stricken testimony concerned merely the availability to the Commission of some of petitioners' files and records (R. 57, 61, 63); hence it clearly was not material to the merits of any of the issues involved in the proceeding.

3. Petitioners do not state in what respect they were prejudiced by the "off the record" directions given by the examiner to the stenographic reporter, but seem to suggest that prejudicial error is to be inferred because of the many instances in which such directions were given. But if the transcript of the hearing is to be confined to that which is material to decision of the issues, discussion between counsel, discussion between counsel and the examiner, and arguments made by counsel should, in many instances, be kept off the record. "Off the record" directions will necessarily be numerous if counsel makes it a practice, after his exception to a ruling has been noted on the record, to argue the matter at length or to repeat and renew an objection already taken and noted. One example will illustrate the kind of problem with which the examiner had to cope here.

After petitioners' counsel had started an apparently lengthy objection, the examiner cut it short with an "off the record" direction, explaining that petitioners' counsel had previously "placed upon the record his objections and stated his reasons therefor, and I don't think there is any good purpose to be served by having a repetition of that in this record" (R. 95–96).

The person presiding at the hearing must be vested with some discretion as to how it shall be conducted, and petitioners make no attempt to show that the examiner in this case, in keeping discussion or argument off the record, acted improperly or transgressed the limits of his discretionary authority.

4. The petition for certiorari complains (pp. 4, 5) that the examiner refused to receive two offers of proof (R. 93, 95) relating to the alleged incompleteness of the transcript of the hearing.

Petitioners' counsel called as a witness the stenographer who had reported most of the hearings up to that point, and stated that he proposed to examine her with respect to over 600 instances in which the transcript was incomplete (R. 90, 92). The examiner barred this inquiry, and properly so. The dragnet character of the proposed examination shows that it was premised upon the theory that the failure to include in the transcript everything said during the course of the hearing by the examiner, by counsel, or by any witness, made the transcript incomplete, irrespective of

whether the omitted remarks or statements were or were not material to the issues before the Commission. In addition, the examiner refused to permit petitioners' counsel to make an offer as to what he proposed to prove by the witness (R. 93),[2] but even if this be assumed to be error, it was harmless error. Petitioners' offer of proof was later presented to and considered by the Commission (R. 32, 40, 42–45, 46–47) and was a part of the record upon which the court below reviewed the Commission's order.

Petitioners' offer of proof does not establish that the hearing was unfair or that they were prevented from making a fair record, since it did not undertake to prove that anything material to the issues or to petitioners' rights had been omitted from the transcript. A party to an administrative hearing is entitled to prove misconduct in the hearing (*Morgan* v. *United States,* 298 U. S. 468), but only if the proposed showing makes out a clear and explicit case of misconduct.[3]

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[2] The examiner also refused a like offer of proof made with respect to one day of the hearing held at Sacramento, which another stenographer had reported (R. 94–95).

[3] Cf. *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9th, 1938); *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. (2d) 953, 955–958 (C. C. A. 8th, 1939).

The showing in the *Morgan* case was that the official who signed the order in question had not personally heard or read any of the evidence presented at the hearing and had not heard or considered the market agencies' oral arguments or briefs.

II

The court below held alternatively that if any evidence material to the issues in this case was erroneously excluded, petitioners' remedy was to apply to it under section 5 (c) of the Federal Trade Commission Act for leave to adduce the excluded evidence. That section authorizes persons against whom the Commission has issued orders under the Act to obtain review thereof by a circuit court of appeals and authorizes an application to the reviewing court for leave to adduce additional evidence. The court, if satisfied that such evidence is "material" and that there were reasonable grounds for failing to adduce it in the proceeding before the Commission, may then order the Commission to take this evidence. The section further provides that the Commission may make new or modified findings by reason of the additional evidence and may recommend the modification or setting aside of its original order.

The provisions of section 10 (e) of the National Labor Relations Act (29 U. S. C., Supp. V, sec. 160 (e)) providing for court review of Board orders[4] are substantially the same as those of sec-

[4] Section 10 (e) authorizes the Board to file a petition for the enforcement of any such order. Section 10 (f), which authorizes any person against whom the Board has issued such an order to file a like petition to obtain review of the order, provides that "the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)".

tion 5 (c) of the Trade Commission Act, and the provisions of section 10 (e) dealing with application to the reviewing court for leave to adduce additional evidence, are word for word the same as the corresponding provisions of section 5 (c) except for the designations of the different governmental agencies involved. In *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 225–226, the Company attacked the validity of an order of the Labor Board upon the ground, among others, that it had been denied a fair hearing and procedural due process because the Board's examiner had refused to receive certain "highly important" testimony offered by the Company. This Court said that the examiner's action was "unreasonable and arbitrary" and "an abuse of discretion," but it held that since the Company had failed to pursue the remedy provided by statute—application to the reviewing court for leave to adduce the excluded evidence—it could not complain of the examiner's erroneous ruling.

This decision is obviously equally applicable to proceedings under the Federal Trade Commission Act.[5] And the court below, when it denied peti-

[5] We should point out that in *Fashion Originators' Guild* v. *Federal Trade Commission,* 114 F. (2d) 80, 82–83, affirmed by this Court on March 3, 1941, No. 537 this Term, the Circuit Court of Appeals for the Second Circuit, without citing the *Consolidated Edison* case, held that the provisions of the Federal Trade Commission Act authorizing application to the reviewing court for leave to adduce additional evidence do not apply to evidence excluded at the hearing. In this

tioners' motion to strike the transcript of the hearing, cited the *Consolidated Edison* case and practically invited petitioners to apply for leave to adduce additional evidence (R. 162).

CONCLUSION

The decision below is clearly correct since petitioners fail to show that anything material to the issues was excluded from the record upon which the Commission entered its order. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1941.

Court neither party referred to this question and the opinion of this Court makes no reference to it.

It should also be noted that the Circuit Court of Appeals for the Eighth Circuit has held, citing the *Consolidated Edison* case, that the remedy of applying for leave to adduce additional evidence given by the National Labor Relations Act "refers to evidence going to the merits of the charge and not to the question of the regularity or fairness of the hearing as conducted by the Board." *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. (2d) 953, 956, *supra*.

U. S. GOVERNMENT PRINTING OFFICE: 1941